Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Department of Hawaiian Home Lands Request for Guidance Regarding Sandwich Isles, Inc.'s Exclusive License Pursuant to Section 253(a) of the Communications Act	WC Docket No. 10-90 CC Docket No. 96-45

REPLY COMMENTS OF SANDWICH ISLES COMMUNICATIONS, INC

Sandwich Isles Communications Inc. ("SIC") submits these comments in response to the Public Notice of February 6, 2017 in which the Commission putatively sought comment on the license that the Hawaii Department of Home Lands ("DHHL") entered into in 1995 with SIC's parent corporation, Waimana Enterprises Inc. ("WEI"). WEI has fully responded to the Public Notice and we submit these comments solely to emphasize several of matters raised in that response. *See* Comment of Waimana Enterprises Inc., WC Docket No. 10-90 (Feb. 27, 2017).

As a preliminary matter, however, we must note the procedural irregularities that have afflicted not only the issues raised in this Public Notice but, more fundamentally, throughout the conduct of these proceedings. The putative licensing issue raised in the February 6 Public Notice was not mentioned in either of the substantive orders issued on December 5. In fact, one of the two public notices specified in the Notice of Apparent Liability ("NAL") was not issued until a few days AFTER the February 6 Public Notice. And, in the unseemly haste to issue the DHHL "request", the Public Notice truncates the DHHL submission to make it appear that the issue is extremely narrow and the outcome self-evident. To compound the process, this Public Notice specified that comments were due only 14 days after the Notice was issued and on a date which

is a legal holiday. Less than one week was allowed for the submission of reply comments and the Motion for an Extension of Time filed by SIC on February 23, has never yet been acted upon.

In this circumstances, there is reason for SIC to be concerned that the Commission may be, at best, uninterested in the merits of any aspect of this matter, that it regards the outcome of the proceedings as a foregone conclusion, and that its sole purpose is to force SIC to discontinue its service to the HHL so as to allow the ILECs to cherry pick the urbanized areas of the HHL without interference from an ETC such as SIC.

These procedural irregularities are underscored by a consideration of the merits as WEI has through its counsel made clear. *See* Comment of Waimana Enterprises Inc., WC Docket No. 10-90 (Feb. 27, 2017). There are three points that bear emphasis:

First, the "exclusivity" conferred by the DHHL license and conveyed to SIC was not and does not preclude competitive service to the HHL. To the extent that it grants exclusivity at all, it does so only with respect to the construction and operation of the "infrastructure" that SIC carried out at the request and under the direction of the DHHL. DHHL itself made this perfectly clear in its letter to the FCC dated December 23, 2004:

"SIC is now investing tens of millions of dollars to pay for the communications infrastructure … without contributions in aid of construction from DHHL or its beneficiaries." *See* DHHL Letter, Micah A. Kane to Marlene Dortch Re: AAD 97-82: Sandwich Isles Communications, Inc., Petition for Study Area Waiver, CC 96-45 (Dec. 23, 2004) (attached as Appendix B to Comment of Waimana Enterprises Inc., WC Docket No. 10-90).

The arrangement under which the communications infrastructure in the HHL was built was designed primarily to further the interests of DHHL and the beneficiaries: the exclusivity

granted to WEI enabled DHHL to shift the entire cost of construction and the risks associated therewith to SIC and its parent company and to assure that infrastructure was provided to all of the unserved HHL lands thus making universal service a reality. Exactly how or why this arrangement offends the policies underlying Section 253 of the Communications Act ---which was designed to prevent artificial barriers to entry to the provision of "telecommunications *service* ---is not explained in the Public Notice. Nor do the comments of either of the two parties that responded to the Public Notice provide a coherent explanation of the issue supposedly raised by Section 253. Indeed, the Comments of Crown Enterprises admits that it is offering mobile services in the HHL under co-location agreements entered into with SIC. *See* Comment of Crown Castle USA Inc., WC Docket No. 10-90 (Feb. 20, 2017).

Second, the Commission has framed the question on which it seeks comments very narrowly and in a way that presuppose that Section 253 is applicable to the arrangement with DHHL. By calling for comment on whether the DHHL "violates" that Section, the implication is that the Commission has concluded at some point that Section 253 applies to arrangements entered into by DHHL. It is certainly true that the Commission has recently backed away from its historic stance on the treatment of "tribal lands" (*See* Connect American Fund, Report and Order on Reconsideration at paragraph 52, FCC 17-12 released March 2, 2017) but even in that context, the Commission has recognized that tribal lands pose special economic, and legal considerations. *See, e.g.* Connect American Fund, Report and Order on Reconsideration at paragraph 7, 51, 53 & FN 130 ("The Commission also sought comment . . . how to . . . achieve the public interest objective of expanding broadband on Tribal lands"). As WEI has pointed out, HHL is closely analogous to tribal lands and that the same legal considerations arise. In fact, the Commission's own rules include HHL within the definition of "tribal lands". *See* e.g. 47 CFR

54.5. There is, as a result, a serious question whether the Commission can even apply Section 253 to the arrangements between DHHL and WEI and derivatively applicable to SIC. Specifically, the question is whether Section 253 (which was added to the Communications Act in 1996) can be read to amend the statutes conferring exclusive sovereignty on DHHL that date back to 1921. *See* Comment of Waimana Enterprises Inc., WC Docket No. 10-90, at 7-9 (Feb. 27, 2017).

And, if Section 253 were to be found to amend the earlier acts of Congress, it would be necessary to consider whether the statute can be applied retroactively to arrangements which were made long before the passage of the Federal Telecommunications Act. It is not necessary nor is it appropriate to address these issues in the context of this Public Notice because the questions are not unique to SIC but indeed is applicable to all communications service providers operating on tribal or other protected lands. What the Commission cannot do is exactly what the public notice implies ---- presuppose the applicability of Section 253 in this case and this case only.

Third, even if a decision is reached in an appropriate proceeding of general applicability that Section 253 does apply to the provisioning of telecommunications infrastructure on tribal and similar protected lands, that conclusion would not yield the question as it has been framed in this Public Notice. Section 253 affords the Commission very limited authority. Section 253 (b) explicitly preserves to the "States" ----- and therefore by extension to sovereign native American authorities such as DHHL----- the power to "advance universal service, protect the public safety and welfare…{and}… ensure the continued quality of telecommunications services…." But these considerations, which are exactly the basis on which the DHHL-WEI infrastructure

arrangement was based, appear to be ruled out of this comment cycle because of the manner in which the issue has been framed.

Accordingly, for the reasons spelled out by WEI in its Comments and the supplemental considerations set forth above, the proper course would be for the Commission to withdraw the Public Notice as improvidently issued. At the most, if any "guidance" is to be provided to DHHL it should be that there is no basis for concluding on this record that the DHHL license violates Section 253 of the Communications Act.

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Respectfully submitted,

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